

Supp. Buss Decl.

Exhibit 1

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON (Pendleton)

3 LEAGUE OF WILDERNESS)
4 DEFENDERS/BLUE MOUNTAIN)
5 BIODIVERSITY PROJECT, an)
6 Oregon nonprofit corporation,)

7 Plaintiff,)

Case No. 2:16-cv-01648-MO

8 v.)

9 UNITED STATES FOREST SERVICE,)
10 an agency of the United States)
11 Department of Agriculture, and)
12 SLATER R. TURNER, District)
13 Ranger, Crooked River National)
14 Grassland and Lookout)
15 Mountain, Ochoco National)
16 Forest, in his official)
17 capacity,)

October 6, 2016

18 Defendants.)

Portland, Oregon

19 **Preliminary Injunction Hearing**

20 TRANSCRIPT OF PROCEEDINGS

21 BEFORE THE HONORABLE MICHAEL W. MOSMAN

22 UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES

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ALSO PRESENT: Ms. Rebecca Harrison
Ms. Tessa Chillemi

(P R O C E E D I N G S)

THE CLERK: Your Honor, this is the time and place set for a temporary restraining order hearing in Case No 2:16-cv-1648-MO, League of Wilderness Defenders/Blue Mountains Biodiversity Project v. the United States Forest Service.

Counsel, can you introduce yourself for the record.

MR. BUCHELE: Good morning, Your Honor. My name is Tom Buchele, appearing for the plaintiff, League of Wilderness Defenders/Blue Mountains Biodiversity Project. I'm joined by my co-counsel, Jess Buss, and by a law student, Tessa Chillemi.

THE COURT: Thank you.

Good morning.

MR. TUSTIN: Good morning, Your Honor. My name is John Tustin on behalf of the federal defendants, and with me today is Rebecca Harris from the Office of General Counsel, U.S. Department of Agriculture.

THE COURT: Thank you both for being here.

I'd like to state my tentative views, and I want to emphasize that they're just that, tentative views, and so if they weren't, we wouldn't be holding this oral argument. But I'm going to do it at some length, in the hopes that it will help you with your oral argument. So you might want to note down positions and questions as we go along.

The parties -- well, the case arises out of the

1 Forest Service issuing a decision memo authorizing logging or
2 thinning on about a 176-acre parcel around Walton Lake in
3 Central Oregon, the stated bases being it improved public
4 safety and forest health. And plaintiff here claims that this
5 violates both the National Forest Management Act and NEPA, and
6 seeks injunctive relief against the proposed action.

7 Now, the parties, thank goodness, agree on the
8 standard for an injunction here, since it's a little bit
9 slippery sometimes, but there are the four basic factors: the
10 likelihood of success on the merits, the likelihood of
11 irreparable harm, the balance of equities tipping in
12 plaintiff's favor, and that the injunction would be in the
13 public interest.

14 And this case may or may not involve the gloss put on
15 that by *Alliance for Wild Rockies* about the balance of
16 hardships tipping sharply in plaintiff's favor, reducing to
17 some degree the showing for success on the merits.

18 So I'd like to take up each of the four main issues,
19 or you might call them elements a plaintiff has to show to get
20 a preliminary injunction in turn.

21 The first is likelihood of success on the merits.
22 And I'll just take each of the two theories in order. The
23 first -- well, the basic theory is that the decision was an
24 abuse of discretion principally because it was in violation of
25 law. And so under the National Forest Management Act, the idea

1 is that there is an existing National Forest Plan for the
2 Ochoco Forest, including this area from 1989. It was amended
3 in '94 and '95 by the Eastside Screens, forbidding logging of
4 trees equal to or in excess of 21 inches unless the Forest
5 Service can rely on an exception established in the Eastside
6 Screens or -- it's also true they can rely on amendment, but
7 that's not our case.

8 So the Forest Service appears to rely on two
9 exceptions. The first is allowing such harvesting or logging
10 to modify vegetation within recreational special use areas.
11 And as to the National Forest Management Act only, as I
12 understand it, plaintiffs agree that this exception applies to
13 what I'll just call the campground area. And I understand that
14 to be about 69 acres, or about 39 percent of the total amount
15 of logging proposed in the decision memo. And so far, so good,
16 I guess, in terms of putting to bed one part of what is being
17 proposed here.

18 As to the second exception, the protection of health
19 and safety, this is the exception that it seems like the Forest
20 Service must rely on for removing what I'll call the remaining
21 61 percent.

22 Now there's some, I think, inference from the
23 briefing of the United States here that they might want to
24 think of the entire parcel as covered by this exception. And I
25 don't know if that's really being advanced by the United States

1 or not. That's one of the questions I'll be asking you, is as
2 to the non-campground areas, if we call them that, they've been
3 described by the United States as areas where people are
4 recreating all over the parcel. I don't know if that's just
5 descriptive or if it's an attempt to say that this other
6 exception, the recreational special use area exception, would
7 apply to the entire parcel. Certainly the reply brief, I
8 think, does a good job of rebutting that inference, in terms of
9 the Forest Service's own descriptions of the remaining lots or
10 parcels, but still a question.

11 But I'm going to operate on the assumption that the
12 Forest Service is relying on the protection -- protecting
13 health and safety exception for the remaining parcels. And so
14 there it's a dispute about what that exception means, almost a
15 textual dispute about what that exception means, and plaintiff
16 says that the exception only applies to public health and
17 safety, not forest health and safety, and cites various reasons
18 for that -- the Forest Service's own positions in the past,
19 its -- that is, the plaintiff's analysis of how that exception
20 would apply to the larger rule, the Ochoco Forest Management
21 Plan, and in particular the Eastside Screens, and other reasons
22 why it contends that the best reading of this text is that it
23 only applies to public health and safety, not forest health and
24 safety.

25 And the Forest Service disagrees and tries to rebut

1 some of the historical reasons cited by plaintiff, and gives
2 its own reasons why it thinks that this exception to the
3 Eastside Screens is broad enough to cover forest health and
4 safety.

5 The main argument here -- I think the key to this
6 point is that the Forest Service accurately cites Ninth Circuit
7 case law to the effect that the Forest Service is entitled to
8 substantial deference to its own interpretation of its own
9 plans and rules. And that's true. And so if this is a dispute
10 about who's got the better reading of the text, then even if I
11 think plaintiffs have a decent reading of the text, so long as
12 the Forest Service also has a plausible reading of the text,
13 then under that substantial deference, plaintiffs would lose.

14 But what plaintiffs have really tried to show is not
15 so much two competing interpretations, but a flip-flop by the
16 Forest Service on its own reading of its own text. And so if
17 the plaintiff can show that -- that is, if it can show that the
18 current version is a flip from an earlier version -- then I'm
19 not going to give deference to a flip-flop reading of the text.
20 You don't get to read it two inconsistent ways and get
21 deference twice.

22 So it's really a battle between whether this is just
23 competing definitions of texts, in which case the Forest
24 Service wins, or is it a flip-flop reading of the text, in
25 which case the Forest Service gets no deference for its current

1 version, and probably therefore the plaintiff at least has a
2 likelihood of succeeding on the merits.

3 That's what I'll be asking you to address. In fact,
4 why don't we break oral argument up a bit, rather than have you
5 remember both theories in your head all at once. Let's just
6 take this one up first and start with that.

7 I'll turn to plaintiffs first.

8 MR. BUSS: Thank you, Your Honor.

9 For purposes of time limits -- excuse me. For time
10 limitations, should I be aware of a need for purposes of this
11 limited argument?

12 THE COURT: Don't worry. I'll guide you very
13 carefully as to how much time I need you to spend on anything.

14 MR. BUSS: Thank you, Judge.

15 Regarding whether or not the health and safety
16 exception was inferred to apply throughout the entire 176-acre
17 parcel, clearly I do think that was inferred in respondent's
18 brief. However, it is not explicitly stated, and as stated in
19 plaintiff's reply, that was not the justification used in the
20 decision memo. The decision memo cites health and safety only
21 in Units 2 through 4, which are primarily grand fir and
22 Doug-fir, where there is the largest infestation of root rot.
23 The justification for health and safety did not extend to the
24 other units, which were justified on forest health reasons.

25 Regarding deference to the Forest Service,

1 plaintiff's position is that it is not a plausible
2 interpretation of the health and safety exception at all, and
3 that even if this was the --

4 THE COURT: Let's start with that. So you're saying
5 it's not plausible because of the Forest Service history of
6 interpreting or it's not plausible on its face?

7 MR. BUSS: Your Honor, setting aside the history of
8 interpretation for a moment, the text itself, starting with the
9 1993 original Eastside Screens, specifically has a
10 parenthetical that explains the scope of the health and safety
11 exception as being limited to roadside or campground hazard
12 trees in a parenthetical. The 1994 amendments simply
13 incorporated the intent of 1993, did not modify the scope of
14 the exceptions at all. The same is true of the 1995
15 amendments.

16 If either the 1994 or 1995 amendments had, in fact,
17 intended to expand the scope of that parenthetical permitting
18 it for roadside or campground hazard trees, NEPA would have
19 been required for the impacts, the great scope increase that
20 that would have entailed. But that didn't happen.

21 Regarding the past interpretation, I believe the
22 Court is referring to Snow Basin and Wolf, which plaintiff
23 cited in both its briefs, and which the defendant did not even
24 attempt to address in its response. And in both of those
25 cases -- and Wolf, which is very recent and is also in the

1 Ochoco National Forest, involved forest plan amendments
2 specifically for forest health reasons. If the Forest Service
3 could have gotten away without doing a forest plan amendment
4 and all the attendant scoping, research, background
5 information, they would have done so if they could have relied
6 on the health and safety exception, but they correctly
7 recognized in those cases that they could not do so.

8 In Wolf in particular, there were several
9 site-specific plan amendments, one of which was only 10 acres.
10 This was addressed in plaintiff's reply brief as well. But in
11 the response, defendants hint that this is such a small project
12 here, 176 acres, that it should somehow be exempt as de minimus
13 as well, but Wolf shows to the contrary. There was also a
14 forest plan amendment there that was about 350 acres as well.

15 THE COURT: I'm not sure -- I mean, I'm not sure what
16 to make of the de minimus argument, but I doubt you rebut it
17 just by saying the Forest Service has previously sought
18 amendments to smaller parcels. I mean --

19 MR. BUSS: Well, Your Honor --

20 THE COURT: -- whether you're allowed to make the
21 de minimus argument or not, but if they're not successful, then
22 they have to go through the process.

23 MR. BUSS: That's true, Your Honor. And, of course,
24 the de minimus doesn't exist, wasn't relied on in the decision
25 memo, so really I add it as a parenthetical.

1 THE COURT: So your main textual argument, which is
2 where we're starting, is that the text, including the
3 parenthetical, indicates a limitation on this exception for
4 public health and safety.

5 MR. BUSS: That is half of the textual argument, Your
6 Honor. The context, which goes along with text, is, of course,
7 within the Eastside Screens itself, but in the larger context
8 of the Ochoco National Forest Plan. The specific purpose and
9 primary purpose of the Eastside Screens is to protect forest
10 health, and old growth in particular. So to interpret the text
11 of the health and safety exception as allowing logging on
12 forest health grounds completely swallows the rule.

13 THE COURT: I'm not sure I've ever really tracked
14 that argument. Why wouldn't it be analytically coherent to say
15 that we have an overall plan that limits logging of these
16 larger trees for forest health purposes but allows the
17 exception when the forest health is specifically in play for
18 some kind of disease?

19 MR. BUSS: Well, Your Honor, the difference is that
20 the Eastside Screens went through a full NEPA analysis, and
21 they do apply to protectable growth and trees over 21 inches.

22 THE COURT: Well, the exception went through a
23 full-on NEPA analysis.

24 MR. BUSS: The exception did, and that's why the
25 exception applies limited to its text. The EAs for both 1994

1 and 1995 Eastside Screens specifically say that the Eastside
2 Screens are to be interpreted restrictively. Snow Basin and
3 Wolf show that any deviation from that strict requirement
4 requires a forest health plan amendment for a site-specific
5 area.

6 THE COURT: Sure. That just sort of begs the
7 question. The Forest Service isn't here saying they're seeking
8 a deviation. They're saying that they're operating within the
9 meaning of what was approved in the NEPA process on the
10 Eastside Screens.

11 MR. BUSS: Yes, Your Honor. However, if an exception
12 to the Eastside Screens' applicability is forest health, and
13 the purpose of the Eastside Screens is to protect forest health
14 and old growth, then in theory the Eastside Screens would never
15 apply in the context of a project designed to improve forest
16 health, which would be most projects.

17 THE COURT: All right. And then your last point
18 textually is the historical point, right, that the Forest
19 Service has previously read these exceptions -- this exception
20 narrowly?

21 MR. BUSS: Not explicitly so, but implicitly, yes,
22 Your Honor.

23 THE COURT: So you've had a chance in your reply to
24 take up the Forest Service's explanations of those historical
25 positions. Anything you wish to add to that?

1 MR. BUSS: Yes, Your Honor. Simply that we didn't
2 have the opportunity to take up the Forest Service's
3 explanation because they did not attempt to explain the past
4 interpretation at all in their response. So plaintiffs are
5 operating somewhat in a vacuum with regard to that argument
6 because we have not received a response to it.

7 THE COURT: All right. Thank you.

8 United States?

9 MR. TUSTIN: Thank you, Your Honor. Are you able to
10 hear me in the microphone here?

11 THE COURT: I can hear you just fine.

12 MR. TUSTIN: I'll begin, Judge, we've discussed a lot
13 about the -- really digging into the forest health exception,
14 but the public health exception clearly applies to the entire
15 project area, including the 61 percent that is outside of the
16 campground concession. And the decision memo and the rest of
17 the record provides ample basis for why the Forest Service
18 determined that this project was necessary to protect the
19 public health, in addition to the forest health, but I'd like
20 to talk about the public health rationale first.

21 As you mentioned at the beginning, it is located
22 entirely within a developed recreation area. It is the most
23 highly visited area of the forest. The forest plan emphasis
24 for this developed recreation area, MA-F13, is to provide safe,
25 healthful and aesthetic facilities for people to utilize within

1 a relatively natural outdoor setting while they're pursuing a
2 variety of recreation experiences.

3 And the treatment options include to direct the
4 Forest Service to utilize all methods to prevent or depress
5 insects and disease outbreaks.

6 In addition, the recreation report noted that
7 developed recreation sites demand the highest degree of public
8 safety, and the forest health biological evaluation also
9 discussed how forest health and public health are -- how
10 developed recreation sites demand the highest degree of public
11 safety because this is a very small project area. It's only
12 176 acres.

13 Let me grab a map. I may have drawn on it
14 inadvertently. Can you ignore the green markings?

15 THE COURT: I can, but to your right is a menu button
16 and a clear button.

17 MR. TUSTIN: Thank you. I'll just use my finger to
18 direct it.

19 The campground concession largely is by Forest Road
20 F220, which is here, but there's also an approximately 300-foot
21 buffer around it. So 61 percent of the area outside of the
22 concession is roughly this perimeter here. But this campground
23 is very small. You have people from the campground who
24 recreate in the entire area all around this -- the developed
25 site. There are trails, such as along here and here, and

1 people can also wander off woods. So the public safety reasons
2 for why there is an exception are very clear and established in
3 the record.

4 In addition, the --

5 THE COURT: Let's slow down for a second here.

6 MR. TUSTIN: Sure.

7 THE COURT: So they're clear and established in the
8 record how?

9 MR. TUSTIN: Because the forest plan direction says
10 the Forest Service must provide safe, healthful and aesthetic
11 facilities for the public to recreate in in this developed
12 recreation area.

13 THE COURT: That wasn't my question. So that
14 requires a showing by the Forest Service to some degree that
15 that's the sort of area impacted by the decision, and not an
16 area in which people aren't recreating freely. So where in the
17 record do I learn that what you've just told me is true?

18 MR. TUSTIN: Well, the recreation report discusses --
19 that's at AR6340. That discusses the recreation of the area.
20 It talks of the entire project area. It's not limited to just
21 the concession. It's talking about the entire project area,
22 including the 61 percent that's outside of the concession.
23 That talks about it.

24 Also the --

25 THE COURT: What would prevent that exception from

1 being used in any area of any national forest? What is the
2 limiting factor?

3 MR. TUSTIN: The limiting factor here is that this is
4 specifically entirely located within the developed recreation
5 management plan, the management unit of the Forest Service,
6 MA-F13, that we note that it has little applicability elsewhere
7 because this developed recreation area is only 1800 acres, or
8 about .2 percent of the entire national forest. So --

9 THE COURT: I'm asking the limiting factor. Are you
10 telling me the limiting factor is that if there's such a plan,
11 a developed recreation management plan in place, that's how I
12 can tell where the exception might conceivably apply or where
13 it would not apply?

14 MR. TUSTIN: Yes. If the project is located within a
15 developed recreation area such as this one, then that is where
16 this exception would be limited to.

17 THE COURT: And then can you also show me where in
18 the decision memo you relied on this exception versus the
19 other?

20 MR. TUSTIN: Yes.

21 THE COURT: For what we call the 61 percent?

22 MR. TUSTIN: And it's mingled together. The
23 plaintiffs just now alleged that the public health exception
24 applies only to Units 2, 3 and 4, but that's not at all what
25 the decision memo says. On page 6359, we're talking about the

1 exceptions to the Eastside Screens. It says that it's exempt
2 from the decision because it protects health and safety and
3 develops and modifies vegetation within the recreation special
4 use area. So there's no distinction between the campground
5 concession and the entire project area. And that's evident
6 from the recreation report and from the whole basis for this
7 project and the fact that the very developed nature of the
8 project area receives a very large amount of recreating public.

9 THE COURT: So your thesis then, if this is true, is
10 in all of this area, there's a risk to public, not just forest
11 but human health and safety, by virtue of falling trees?

12 MR. TUSTIN: Yes. And -- yes, and because of the
13 falling trees and also because of the dense fuel load that is
14 accumulated in other areas. And, in fact, plaintiffs in their
15 declarations indicate that they recreate throughout the entire
16 project area. Their declarations don't say they're limited to
17 the campground concession. They say they enjoy walking
18 throughout the area. Ms. Coulter's declaration at paragraph 6,
19 Ms. Miller's declaration at paragraph 7, talk about the entire
20 project area. In addition, Mr. Slater, the district ranger,
21 said that people recreate throughout the entire project area.
22 The popularity of the site proves that.

23 THE COURT: All right. So point number one is you
24 deem the entire area as a recreational special use area?

25 MR. TUSTIN: No, not entirely.

1 THE COURT: Isn't that what you have to say to rely
2 on that exception?

3 MR. TUSTIN: No, because the recreation special use
4 area is limited to the campground concession, but the public
5 health and safety thing applies to the management area, so
6 within this project.

7 THE COURT: So I think I misunderstood where you were
8 headed with the argument. I think I understood the argument
9 but not your goal. I thought you started out by saying the
10 initial exception as to -- that clearly, or at least plaintiffs
11 agree applies to the campground area, which is the -- to modify
12 vegetation within recreational special use areas applies to the
13 entire area. Is that your position?

14 MR. TUSTIN: No. The position is -- I apologize if I
15 was not clear. We agree that the recreation special use area
16 is only the campground concession, that 39 percent. But the
17 Forest Service also relied on the protect public health and
18 safety exception for the entire project areas. So the second
19 exception applies to everything, for the reasons stated,
20 because it's a developed recreation area.

21 THE COURT: And therefore you're relying on both
22 forest health and human health for the entire area?

23 MR. TUSTIN: Well, we think that the -- we argue that
24 the second exception, the public health and safety exception
25 applies to both public health and forest health. Right now I'm

1 talking about how it applies to public health, and I can go in
2 and talk about how it applies to forest health.

3 THE COURT: No, I think I understand where you're
4 headed now.

5 So what you're really telling me is -- first you're
6 asserting that the exception applies to public health, and
7 that's sort of unexceptional because plaintiffs agree with
8 that. But then you're also asserting that public health is at
9 risk throughout the area, not just forest health.

10 MR. TUSTIN: Yes. But, again, there are two
11 exceptions that we're relying on, and the second exception is
12 to protect public health, to protect public health and safety.
13 The "public" portion of that applies throughout the entire
14 project area, and that is the basis for this decision. There's
15 also a forest health component.

16 THE COURT: We'll get to that in a second. Just so
17 I'm clear, though, what plaintiffs have argued is that the
18 public health is only at risk in a campground area, in
19 campground areas. And you're asserting that no, it's at risk
20 in the entire area because people recreate throughout the
21 entire area.

22 MR. TUSTIN: That is correct, yes.

23 THE COURT: All right. And then you also assert that
24 in any event, this exception is broad enough to cover forest
25 health in the entire area?

1 MR. TUSTIN: Yes.

2 THE COURT: And your textual support for that reading
3 is what?

4 MR. TUSTIN: The textual support of that reading is
5 in the history of the Eastside Screens amendment. We've
6 discussed in our brief how plaintiffs are relying on a 1993
7 letter that does contain a parenthetical that is limited to
8 roads and campgrounds. But that parenthetical was not adopted
9 in the 1994 screens. In addition, there is a fourth exception
10 added to that. So that '93 letter may have been a background,
11 it may have provided some information, but that's not what was
12 adopted in 1994.

13 And furthermore, in 1995, the Forest Service
14 explicitly amended the screens to allow this exception to
15 provide forest health in certain circumstances. And we
16 discussed that how if you don't allow thinning in an old growth
17 area or areas of large old trees, that failure to act provides
18 the very basis that is a threat to the labeled species that are
19 being protected here, the large ponderosa pines.

20 THE COURT: What do you make of plaintiff's argument
21 that your current position is inconsistent with the positions
22 taken previously by the Forest Service?

23 MR. TUSTIN: And I believe they're referring to the
24 Wolf EIS and Snow Basin project. Those are completely
25 distinguishable, because in those projects, the Forest Service

1 was not relying on an exception to the Eastside Screens. There
2 they had done a forest plan site-specific amendment. Here
3 there is no site-specific amendment. We are relying on an
4 exception to the Eastside Screens to allow this project to go
5 forward.

6 THE COURT: All right. Thank you.

7 It's plaintiff's burden, so I'll let you reply
8 briefly.

9 MR. BUSS: Thank you, Judge. Pardon me.

10 Defendant has just confused and conflated the
11 recreation special uses area, which is the designated
12 campground area, 68.8 acres, with the rest of it, which the
13 forest plan itself, even going back to 1989, defines the MA-F13
14 developed recreation area as including two distinct sites, the
15 developed site area -- this is at record 1650 -- and separately
16 from that a visual influence area.

17 There are two different restrictions for logging in
18 those areas. In the developed site area, harvesting is to be
19 for maintaining safe and attractive recreational sites. For
20 visual influence area, which is everything out of the developed
21 site, it is to be done for meeting visual quality objectives
22 and maintaining healthy stands. Nothing about safety there.

23 THE COURT: I don't think that's the real issue. The
24 issue is that the Forest Service says, and you agree that there
25 is an exception to the Eastside Screens for the protection of

1 health and safety.

2 MR. BUSS: Yes, but --

3 THE COURT: You agree that that applies to
4 protecting, you know, what we'll call human health and safety,
5 public health and safety?

6 MR. BUSS: To the extent that it covers roadside or
7 campground hazard trees, Your Honor, we do. Because that's the
8 language of the --

9 THE COURT: That's what you agree on so far.

10 But the exception is for protecting health and
11 safety. Let's assume that that exception means public health
12 and safety not forest health and safety. That's the core of
13 your position, isn't it?

14 MR. BUSS: Well, I wouldn't characterize --

15 THE COURT: It does not cover forest health and
16 safety?

17 MR. BUSS: Our position is that it does not cover
18 forest health and safety, yes.

19 THE COURT: The government's main argument is simply
20 that they're not only relying on forest health and safety for
21 this entire area, they're relying on human or public health and
22 safety for the entire area.

23 MR. BUSS: Yes, Your Honor.

24 THE COURT: First, before you get into the weeds of
25 your argument, what's your position as to whether that's

1 factually accurate that, in fact, human health and safety is at
2 risk in the entire area?

3 MR. BUSS: Your Honor, our factual position on that
4 is that health and safety is only an issue in the area that we
5 are not objecting to logging happening, in the area outside the
6 scope of the preliminary injunction request. And that's
7 supported by the *Field Guide for Hazard-Tree Identification and*
8 *Mitigation*, which is specifically relied on by the Forest
9 Service, and according to the Forest Service Manual, is the
10 document used to determine whether trees are hazard trees or
11 not.

12 And the record at page 5553, there's a table that
13 describes the hazard risk for various trees, including live
14 trees and laminated root rot centers, which would be Units --
15 at least parts of Units 2, 3 and 4. Those score a level 2 out
16 of 4, qualify as a low failure potential if they're greater
17 than 25 feet away from an infected tree, and a medium failure
18 potential if they're closer than 25 feet.

19 None of those are high failure potential. They don't
20 constitute by themselves a health risk because the chances of
21 someone being outside of the developed recreation area are so
22 small that at the time the tree might fall someone would be
23 standing there.

24 THE COURT: How do you know that?

25 MR. BUSS: Well, Your Honor --

1 THE COURT: Not that the tree might or might not
2 fall, but how do I know the core question, which is are there
3 people regularly present in the areas outside the campground
4 still within the decision memo?

5 MR. BUSS: I don't think you know that, Your Honor,
6 because the record doesn't support people being in those areas.
7 In the response --

8 THE COURT: You're saying I don't know one way or the
9 other or do you have facts showing that people are not there?
10 The Forest Service's position is given the nature of this site
11 and its designation, the uses to which it's being put, that a
12 fair inference is that there are people tromping around
13 throughout the area, on trails and all around. Just for
14 purposes of argument, if you take them that far, do you have
15 facts that rebut that?

16 MR. BUSS: Your Honor, the maps included in the
17 record do not show an extensive trail system through the
18 disputed area. In fact, I do not believe they are there, but
19 certainly not in the highly disputed area where clearcutting is
20 proposed, in Units 2 through 4, there's no evidence of any
21 trails whatsoever off of the main roads. And it's difficult
22 for plaintiffs to prove a negative here, Your Honor, but I'm
23 not aware of anything in evidence in the record supporting
24 trails through those areas.

25 THE COURT: What about the designation of the entire

1 area for recreation far above and beyond the national forest
2 itself?

3 MR. BUSS: I don't believe there's any evidence in
4 the record, Your Honor, also to support that there's higher
5 incidents of use in the --

6 THE COURT: I'm not now asking about factual
7 incidents of use, I'm asking about what I asked the government
8 to propose as a dividing line between national forest generally
9 and areas where they can claim -- legitimately claim risk to
10 public health.

11 MR. BUSS: I don't think there is any distinction
12 there, Your Honor. The forest plan itself invites people to
13 recreate throughout the forest. There is no distinction
14 between that and the visual influence area around a developed
15 campground. The public may go anywhere they wish to go in the
16 national forest. It doesn't mean that the Eastside Screens
17 don't apply throughout the national forest.

18 THE COURT: All right. Thank you.

19 Let's turn to NEPA. I'll give you my tentative
20 views.

21 So, as you're aware, the Forest Service applied or
22 sought to apply a categorical exclusion to this proposed
23 action, and plaintiff claims this decision is arbitrary and
24 capricious for two reasons: one, improper scoping; and two, an
25 inappropriate reliance on the categorical exclusion.

1 So plaintiff has proposed basically three reasons why
2 there was improper scoping: one, that there was an inadequate
3 description of the scale and impact of the activity being
4 proposed, including but probably not limited to failure to
5 disclose the number of trees to be impacted.

6 Second is that the Forest Service used misleading
7 language, said "thinning" when it really meant a form of
8 clearcutting, et cetera.

9 The third is that -- this is reliance on the fact
10 that the Eastside Screens themselves say that NEPA and Section
11 7 must be met even in actions taken under exclusions or
12 exceptions. The third, I guess, has two parts. So 3.1 is a
13 failure to disclose its intention to use the Eastside Screen
14 exceptions to log these 21-inch-or-greater trees. So without
15 pointing that out in the scoping, they get inadequate public
16 response.

17 And 3.2 is -- I'm not sure this is something
18 plaintiffs are actually relying on or just that it's glancingly
19 mentioned when Section 7 is mentioned, and that is a failure to
20 consult with U.S. Fish and Wildlife as a part of what didn't
21 happen here.

22 The Forest Service has responded to the first two
23 arguments about essentially the adequacy of their description
24 of their activities, and I think -- tentatively, I think
25 adequately responded to the complaints about the adequacy of

1 their description, but hasn't responded at all to the third
2 argument in any way. And so I think this issue turns on the
3 Forest Service's response to .3.

4 I'll turn to the Forest Service first to talk about
5 the categorical exclusion.

6 MR. TUSTIN: That was disclosed. The plaintiffs
7 claim that the Forest Service must somehow explicitly state in
8 their scoping notice that we are relying on exception to the
9 Eastside Screens. That, I think, is reading too much into the
10 NEPA regulations. The designation for -- the instructions for
11 scoping are to provide the public with notice. The scoping
12 notice clearly says it proposes to remove the host species and
13 to remove trees of all sizes. So if you're removing trees of
14 all sizes, you will be removing trees that are greater than
15 21 inches.

16 So we think that that disclosure was sufficient to
17 allow parties to participate, and indeed plaintiffs did have an
18 opportunity and did provide comments about the reliance on the
19 Eastside Screens exceptions. They said you cannot log trees
20 greater than 21 inches. So they provided their views on that,
21 and they were not prejudiced by the Forest Service's disclosure
22 to rely on -- or to indicate that we would be harvesting all
23 species or species of all sizes.

24 THE COURT: So your principal -- since you didn't
25 specifically reference any exceptions -- correct?

1 MR. TUSTIN: Correct.

2 THE COURT: -- you're relying on the fact that when
3 you say "of all sizes," that is a red flag to interested
4 persons, and it must have been enough because it was enough for
5 plaintiffs to know what they wanted to say on this subject?

6 MR. TUSTIN: Yes. Not just plaintiffs. There were
7 other people that commented, also expressed concerns, but there
8 were also those who supported the proposal and wanted
9 additional logging along Forest Road 22. So there were people
10 that supported and disagreed. It was -- the public had an
11 opportunity to express their views and concerns about removal
12 of trees greater than 21 inches.

13 THE COURT: What about the Section 7 requirement?

14 MR. TUSTIN: I don't believe that was fully briefed
15 in plaintiff's brief, but here, the categorical exclusion, one
16 of the steps -- one of the reasons -- excuse me, one of the
17 bases to rely on the categorical exclusions is that there are
18 no extraordinary circumstances here. And there aren't. The
19 Forest Service did do a biological evaluation, and in a
20 decision memo it discusses how consultation was not required
21 because there were not any threatened or endangered species.
22 So that was not necessary.

23 THE COURT: Thank you.

24 Go ahead, sir.

25 MR. BUCHELE: Your Honor, I agree there's not an ESA

1 issue here, but I think -- I'm not going to give up so easily
2 on this. This is the only scoping issue.

3 Your Honor, thinning and clearcutting are not the
4 same thing. There is nothing in the scoping notice that put
5 the public on notice that they were going to clearcut 40 acres
6 in a visual enhancement area, and if there had been, there
7 would have been many, many more comments on this issue. They
8 are still posting notices out there with regard to that
9 specific area, calling it thinning. Those are not the same
10 thing.

11 THE COURT: What do you mean by clearcutting?

12 MR. BUCHELE: Clearcutting is taking out all the
13 trees, and that is what they're doing. That's what they call
14 it. That's in the record. Internally they called it
15 clearcutting. And those are not the same thing, Your Honor.

16 THE COURT: And the other argument?

17 MR. BUCHELE: The other argument is -- and I think
18 that really it comes together with the NFMA argument, Your
19 Honor. The Eastside Screens clearly say you have to comply
20 with NEPA if you're going to use the exceptions. The only
21 chance the public gets to have an involvement in the NEPA
22 process when they're using the categorical exclusion is the
23 scoping notice.

24 When they were developing the scoping notice, the
25 Forest Service said let's focus on -- get the public to focus

1 on significant issues. There is nothing more significant in
2 the Eastern Oregon forests than trying to exceed the Eastside
3 Screens limitations.

4 THE COURT: You heard the main argument, which is
5 that somehow whatever they said was enough to clue you in that
6 you had to object on the basis of failing to follow the
7 Eastside Screens. Why isn't that sufficient under NEPA?

8 MR. BUCHELE: We knew that they were going to log in
9 excess of the screens. That is certainly true. But we did
10 not -- but, if you notice, my clients still thought they were
11 thinning. That's what it says in the scoping.

12 THE COURT: That's a different argument. I'm asking
13 you to focus on the NEPA violation, failing to reference the
14 exceptions. If you extrapolate from whatever they may have
15 inadequately said -- let's assume that what the Forest Service
16 does in the abstract is inadequate, but you figure it out and
17 so you make the same objection you would have made had it been
18 adequate. Is that a NEPA violation?

19 MR. BUCHELE: Under those facts, I don't think it
20 might be, Your Honor, but those aren't the facts.

21 THE COURT: Setting thinning to one side, didn't you
22 make the same objection -- that is, they're failing to follow
23 the Eastside Screens -- that you would have made had they said,
24 "We're seeking an exception to the Eastside Screens"?

25 MR. BUCHELE: Not at all, Your Honor, because simply

1 saying you need to follow the Eastside Screens, which is what
2 our client said, is different from explaining why those
3 exceptions don't apply.

4 Your Honor, to use the forest health, to use that
5 exception for public health and safety is unprecedented. My
6 client would have submitted lots of evidence if they had tried
7 to do that. They had no idea the Forest Service was trying to
8 use it in that way.

9 I have seen a lot of scoping notices for timber
10 sales. I've seen a lot of draft EAs and EISEs. I have never
11 seen the Forest Service put out a scoping notice when they
12 intended to violate the screens where they didn't explain how
13 they were violating the screens or how they were addressing
14 that.

15 And, again, public safety, if they were relying on
16 public safety and they were claiming that this entire area was
17 public safety, as you said to Mr. Buss, we would have put in
18 evidence showing that that's not the case here. We had no
19 opportunity to do that, Your Honor, because the scoping notice
20 did not put us on notice on what exception they were using.

21 That is not an incredible burden. It requires a
22 sentence to do that. And they didn't do that. And there's
23 just really no excuse for that, especially when the screens
24 themselves specifically say if you're going to use the
25 exceptions, you have to comply with NEPA. The only way to do

1 that here is to list it in the scoping notice. We had no
2 opportunity to put on evidence about the use of the exceptions
3 to allow clearcutting, which is unprecedented, and allow it
4 throughout this area for that kind of thing. That just has
5 never happened before, and our client should have had the
6 exclusive opportunity to address that issue if they were going
7 to do that here.

8 THE COURT: Thank you.

9 Would you start with thinning versus clearcutting,
10 and we'll come back to that issue, I guess, since it's been
11 raised again in oral argument. Did you ever use the word
12 "clearcutting" ever?

13 MR. TUSTIN: Well, that is not what is being
14 proposed. There is --

15 THE COURT: So the answer to my question is no?

16 MR. TUSTIN: The decision, the scoping notice is
17 clear of what types of trees are going to be removed. It said
18 it will remove the host species and remove species of all
19 sizes, and explained why it was necessary and where they would
20 be removed, so that the extent of the removal of the
21 Douglas-fir and grand fir was very clear in the scoping notice.
22 Plaintiffs had the opportunity --

23 THE COURT: Your contention is that the scoping
24 notice puts people on notice that all Doug-firs and grand firs
25 of all sizes would be removed?

1 MR. TUSTIN: Yes. And it also clarified, the
2 decision memo clarified that -- you know, we talk about
3 clearcutting, people believe that everything is removed.
4 That's not what is happening here. They are removing most, if
5 not all, most of the firs, but they are -- as we discussed in
6 our brief and the decision memo discusses, they are leaving
7 certain clumps further away to provide for diversity. But the
8 vast majority of fir will be removed, but there are some
9 retention groups that are -- that do remain in the project
10 area.

11 THE COURT: So is that clearcutting or not, in your
12 view?

13 MR. TUSTIN: That is not clearcutting because you're
14 leaving trees, some trees. But most of it is being removed.

15 THE COURT: Well, when you say removing Doug-fir
16 and --

17 MR. TUSTIN: And grand fir.

18 THE COURT: -- and grand fir. So separate from the
19 retaining clumps you've just described, isn't that de facto
20 clearcutting, where at least that's happening?

21 MR. TUSTIN: In the comments that's the term, yes,
22 but there will be replanting of resistant species that will
23 provide --

24 THE COURT: Let me just ask you a question in the
25 abstract. If, in fact, the Forest Service proposes in reality

1 to engage in clearcutting but describes it in the decision memo
2 as thinning, is that inadequate scoping, just in the abstract?
3 If you're going to clearcut but you say "thinning," is that
4 error?

5 MR. TUSTIN: I would say yes, but the decision memo
6 does not say that. They talk about how they're removing --

7 THE COURT: Well, what we have to get at is the ways
8 in which you've adequately described what you were doing beyond
9 just saying "thinning," right? If you just said "thinning,"
10 would that also have been inadequate?

11 MR. TUSTIN: I think it wouldn't because it's talking
12 about the reasons for the thinning and also the removal of the
13 heavily infected species.

14 THE COURT: So where you get at adequate public
15 notice here is where the decision memo says we're taking out
16 all trees of all sizes of these subspecies of fir?

17 MR. TUSTIN: That was actually the scoping notice,
18 because the scoping notice did say that, and NEPA does not
19 have -- there's no cutoff date for providing comments. There
20 is a deadline for providing scoping comments, but --

21 THE COURT: I'm not worried about comments yet. Slow
22 down. I'm trying to get at the adequacy of the scoping notice.

23 So you're claiming it's adequate by describing that
24 you're taking out all of the two subspecies of fir?

25 MR. TUSTIN: Yes.

1 THE COURT: And I suppose your position would be that
2 even independent of the clumps that were left for diversity
3 purposes, the description would nevertheless have been adequate
4 since it's telling people all of the trees are being taken out?

5 MR. TUSTIN: Yes, it is.

6 THE COURT: Separate from the clumps, what's left?

7 MR. TUSTIN: In the Units 2, 3 and 4?

8 THE COURT: When you're done doing what you propose
9 to do, what's left? What species are left?

10 MR. TUSTIN: There are -- larch are left, there are
11 some ponderosa pines, conifer -- not as many, there are some.
12 And there will be clumps, as we mentioned. There are larch,
13 there are ponderosa pine.

14 And then the second portion of the project, which we
15 hope to do in the spring, is to replant with resistant species,
16 to replant with more larch, hardwoods, and some shrubs and
17 bushes that will not only provide future larger trees for them
18 to enjoy and aesthetics, but also they serve as limitations on
19 how the laminated root rot can expand into this developed
20 recreation area.

21 So as the recreation report noted, the visual impact
22 from Units 2, 3 and 4 is going to be dramatic for the first
23 couple of years, since most of the trees will be removed, but
24 not all. The ponderosa pine and larch remain.

25 But I also would like to note that the opportunity to

1 provide comments is not just the written comments. The Forest
2 Service did organize a field trip in August, of mid August, and
3 provided a further opportunity for the public to comment. And
4 that is not at all required, but that provided additional
5 opportunity for plaintiffs to respond.

6 THE COURT: Thank you.

7 MR. BUCHELE: Your Honor, if I may.

8 THE COURT: Yes.

9 MR. BUCHELE: To respond to Mr. Tustin's last point,
10 there are notes about the field trip in the record. There is
11 no evidence in those notes that the exception to the screens
12 were discussed in any way in that field trip or disclosed to
13 the public.

14 Just -- this is the notice. This is a one-page
15 notice that was attached to the scoping notice. And it was
16 posted at the campsite. And it says, block 1, "The project
17 would thin Douglas-fir and grand fir." It's quite clear.

18 This is how the Forest Service --

19 THE COURT: Why would I care more about that than the
20 scoping notice?

21 MR. BUCHELE: This was attached to the scoping
22 notice.

23 THE COURT: Sure, but it's a part of the scoping
24 notice.

25 MR. BUCHELE: It's a part of it, but that's what the

1 public saw, and a lot of that is what the public focused on.

2 As I said, my client's response referred to it as thinning.

3 THE COURT: I'm sorry, did you also see the scoping
4 notice?

5 MR. BUCHELE: Yes, they saw the scoping notice as
6 well.

7 THE COURT: Which is a more complete description,
8 correct? It --

9 MR. BUCHELE: It is a more complete description, Your
10 Honor, but what they described internally is right there. This
11 is a clearcut, and that is not described in the scoping notice,
12 Your Honor.

13 THE COURT: Well, again, this isn't our case exactly,
14 but if the Forest Service didn't use the word "clearcut" in a
15 scoping notice but said, "We're taking out all sizes of these
16 two species of trees," wouldn't that be adequate even though
17 they didn't actually say the word "clearcut"?

18 MR. BUCHELE: No, Your Honor, because in context,
19 what they didn't explain was --

20 THE COURT: I'm not asking about our case.

21 MR. BUCHELE: Okay.

22 THE COURT: I gave you a hypothetical.

23 MR. BUCHELE: I think it depends on the facts, Your
24 Honor.

25 THE COURT: But the mere absence of the word

1 "clearcut" isn't fatal, is it, if you otherwise adequately
2 explain it?

3 MR. BUCHELE: No.

4 THE COURT: You have to say the word "clearcut"?

5 MR. BUCHELE: I don't think you have to say the word
6 "clearcut."

7 THE COURT: Well, that's what I just asked you.

8 MR. BUCHELE: Right. But what I think you do have to
9 say, though, is the area in which you're taking out all the fir
10 is, in fact, mostly fir. They didn't tell the plaintiff that.

11 THE COURT: All right. So if you say, "We're taking
12 out all the fir," that might be the inference that, you know,
13 there's a bunch of other trees there, but the public needs to
14 be informed that when we say "all the fir," we mean almost all
15 the trees that are there.

16 MR. BUCHELE: When you couple it with repeatedly
17 referring to it as thinning, which they did, I think that's
18 very misleading.

19 THE COURT: All right. Thank you.

20 I want to be brief about the last issue on likelihood
21 of success, and that's the categorical exclusion for what has
22 been called in the briefs, at least, sanitation harvest.

23 And there are a series of arguments about why that
24 exclusion really shouldn't apply here, sort of a reprise of the
25 argument made earlier that if the sanitation harvest

1 categorical exclusion means what the Forest Service now says it
2 means, then it's an exception that swallows the rule.

3 There's quite a bit of argument about what "adjacent
4 to" really means, and so the Forest Service responds to those
5 in part, but then its main argument really, or at least the one
6 I think has the most strength under Ninth Circuit law is that
7 as to what's needed for a sanitation harvest and, you know,
8 what's necessary or not in terms of creating a buffer of
9 adjacent trees, that the scientists asked this question, having
10 analyzed the threat in this area, and have determined what's
11 necessary to control for disease and spread of insects or
12 disease.

13 So there's certainly a number of cases that
14 repeatedly counsel district courts in my position not to act as
15 some sort of roving science panel, but why wouldn't that be
16 enough? If the Forest Service has scientific evidence that the
17 proposed action is, in fact, necessary to control the spread of
18 insects or disease, based on what would I say, well, that's
19 probably not going to carry the day?

20 MR. BUCHELE: Your Honor, that's not enough because
21 that's not what the CE says. If the Forest Service wanted to
22 write a CE that said we can log all 250 acres if necessary for
23 forest health purposes, they should have written that CE.
24 That's not what this one says. It's got language right in the
25 middle that says when you do that, you have to take out

1 diseased trees or adjacent undiseased trees. It doesn't say
2 you can go in and just decide you're not going to pay any
3 attention to that and just take out the whole unit.

4 Categorical exclusions --

5 THE COURT: Just to be clear, the Forest Service as
6 an agency isn't simply saying, well, we just want to take out
7 all these trees. Their position today is we're taking out the
8 number of trees that scientists who have evaluated the area say
9 is necessary to control for disease or insects.

10 So I'm now supposed to say, well, I know that's --
11 Let me ask you this in stages. Are you asking me to make any
12 decision based on the assumption that that's going to be shown
13 to be scientifically invalid?

14 MR. BUCHELE: Our argument here, Your Honor, is not
15 about science. Our argument is about the language of the
16 categorical exclusion. Again, if the Forest Service wanted to
17 write a categorical exclusion that basically left it up to
18 their scientists on what needed to be done within a 250-acre
19 area, they could have done that.

20 Categorical exclusions are based on the Forest
21 Service's prior history with similar projects. They need to be
22 interpreted narrowly with specific language, because they do
23 short circuit the NEPA process.

24 There is nothing in this that says that. The CE
25 specifically has language in the middle of it that says,

1 "including diseased trees and adjacent healthy trees." There's
2 no reason to have that language there if it doesn't mean
3 something and it's not a limiting term.

4 THE COURT: So you define "adjacent" to be near or
5 close to but not necessarily touching?

6 MR. BUCHELE: Your Honor, I don't think the Court
7 needs to decide what "adjacent" means.

8 THE COURT: But I do have to decide that. The Forest
9 Service is saying these are adjacent trees and you're saying
10 they're not adjacent. I don't know how to get out of that box
11 without deciding what adjacent trees are.

12 MR. BUCHELE: Your Honor, that's actually not the
13 argument they made. The argument they made was the whole unit
14 is diseased so we can just take out everything. But the
15 categorical --

16 THE COURT: Well, they certainly disagree with your
17 definition of "adjacent."

18 MR. BUCHELE: They say that language doesn't mean
19 anything, and it's just an example. That's their argument,
20 Your Honor.

21 And our argument is that language means something and
22 has to be given meaning, and it doesn't mean -- they say that
23 they should be able to log by units or stands under the CE, but
24 again that's not what the CE says.

25 THE COURT: I want to take up one other issue in the

1 limited time we have left, and that's the balance of equities
2 and hardships. So I'll just say this about the likelihood of
3 irreparable harm. So this is really a showing plaintiff has to
4 make. It's not so much a balancing as whether plaintiff has
5 shown irreparable harm. And I believe they have here.

6 I do -- I think there are a couple of predicate
7 issues on irreparable harm. The first that's raised by the
8 government at least is this idea that plaintiff has engaged in
9 delay for the purpose of gaming the system, to gain a tactical
10 advantage. That's focused on the idea that you knew about this
11 in May and filed a lawsuit in the fall, just on the heels of,
12 you know, upcoming winter, changing the whole game.

13 I've never really gotten from plaintiff an adequate
14 answer to whether you are, in fact, using delay to game the
15 system, but it has precious little to do with irreparable harm
16 anyway. It doesn't mean it's irrelevant. The harms are
17 irreparable or not even when someone is gaming the system
18 through delay, but an injunction is an equitable remedy, and
19 you can seek an equitable remedy with unclean hands if it
20 factors in that way.

21 And the second, I think, is I just have to look at
22 this as incremental or marginal harms. The plaintiffs want to
23 say here is a site and we're entitled enjoy it as it is now,
24 undisturbed by future action. And that's not quite right
25 because I'm not comparing the site as it is now with the site

1 as it is after it's completely disturbed by this plan and
2 seeing if there's irreparable harm there. I'm comparing the
3 site as it is following an agreed-upon disturbance of
4 39 percent or so, and then 100 percent disturbance if the whole
5 thing goes into play.

6 So it's a bit of a difference at least. I'm not sure
7 it matters a lot, but it's not -- it's not status quo ante
8 versus completely after everything is done. It's rather a
9 comparison between the trees that are going to be taken out
10 near the campsites and roads versus later. In any event, that
11 still leaves, I think, a substantial number of trees that would
12 be downed.

13 The government has suggested that you can't really
14 make this claim in a managed site. That is, if you want to say
15 we're entitled to a view of the undisturbed forest, that since
16 this is a previously and continuously managed site, that
17 doesn't quite fit here. But I don't think plaintiffs in this
18 situation have to show that they are trying to enjoy sort of a
19 primeval forest. I think you can enjoy a managed forest in its
20 current condition without further cutting and make a claim.
21 All that is by way of my explanation of why I think there's
22 irreparable harm here.

23 The real ballgame is balance of hardships. The
24 plaintiff doesn't have a lot that it has to offer here. Its
25 hardship is the same as its irreparable harm, the lost trees.

1 So the Forest Service is the one that has to show,
2 well, this is going to be a hardship on us if we have to wait
3 to see this thing resolved at trial.

4 So if you didn't have to go to trial, then you'd
5 begin right away, and you'd have certain things done,
6 presumably before the campground opens next spring. If you had
7 to wait until a trial, and you only won this thing in February,
8 then what would the harm be? How would your view on the ground
9 be different in ways that are harmful to your interests if
10 you -- if I gave an injunction and you couldn't move forward on
11 this project until next spring?

12 MR. TUSTIN: Yes, Your Honor. I believe that the
13 declaration of Mr. Slater lays it out well that if we have to
14 wait until February, this project probably cannot be
15 implemented this year -- in fact, it can't be implemented by
16 this year.

17 THE COURT: What do you mean by "this year"?

18 MR. TUSTIN: It would not be implemented prior to the
19 campground being opened in May of 2017.

20 THE COURT: So your first harm is that you might lose
21 the public's access to the campground next year?

22 MR. TUSTIN: At least, yes.

23 THE COURT: You think you might lose it for 2018?

24 MR. TUSTIN: If we prevail next spring, then they
25 could do it and they would be able to open the campground

1 likely --

2 THE COURT: Well, that's my whole analysis. It's not
3 what happens after that. It's what are the shifting positions
4 of the parties after trial. That's what balance of hardships
5 asks me to look at.

6 So if you have to wait until a trial in February, and
7 you win, what have you lost by not defeating the injunction
8 today? And one is you might have to close the campground in
9 the spring, summer, and fall of 2017, right?

10 MR. TUSTIN: Yes.

11 THE COURT: Not '18?

12 MR. TUSTIN: Yes.

13 THE COURT: What else?

14 MR. TUSTIN: Well -- so the implementation of the
15 project would not be able to be done due to the timing.
16 There's the revenue portion, but that is small, \$7,000. That,
17 frankly, is not important. We provided that for your
18 information.

19 In addition, the way the contract is structured, it's
20 an integrated resource contract, where the Forest Service is
21 paying the purchaser to -- or the recipient to do this
22 contract. It is possible the Forest Service could rebid the
23 project, but they have not -- there was only one offer on this
24 one here that it is not certain that the Forest Service would
25 be able to have this done as an integrated resource contract,

1 where the Forest Service is paying approximately \$78,000 to the
2 purchaser to remove the timber and to do all of the additional
3 work. If there was a point in the future, they might be able
4 to, but they may not. And admittedly, that is speculative, but
5 it is important to know that what we have now is an acceptable
6 way to achieve the Forest Service's management objectives, to
7 provide for a safe recreation environment at minimal cost to
8 taxpayers.

9 THE COURT: So if you lose that, you're saying you
10 might lose this contractor?

11 MR. TUSTIN: Yes.

12 THE COURT: And you'd have to replace this contractor
13 with whom or what?

14 MR. TUSTIN: Potentially another contractor in 2018,
15 or the same contractor. But it's not clear this contract would
16 be able to be agreed upon again in 2018.

17 THE COURT: Why are we talking about 2018? If you
18 win this case in February, do you turn to this contractor and
19 say, okay, go ahead?

20 MR. TUSTIN: Well, we would, yes, but he would not be
21 able to do it until the following year, based on his
22 availability of employees or equipment. So they --

23 THE COURT: You already know if you can't do it this
24 fall, this person cannot do it in 2017?

25 MR. TUSTIN: I do not know that for certain. So the

1 contractor could potentially do it in 2017, but again, we've
2 lost the value -- lost a year of recreation.

3 THE COURT: All right.

4 MR. BUCHELE: Your Honor, may I respond?

5 THE COURT: You don't need to.

6 I'll take a brief break and give you my ruling.

7 THE CLERK: This court is in recess.

8 (A recess is then taken.)

9 THE COURT: Thank you all for your help with this
10 issue. I'm sorry we didn't cover all the issues. There's a
11 limited amount of time and I think we hit the ones I was most
12 concerned about.

13 As you're familiar, there are four factors I need to
14 take into account. I'm going to work backwards through them.

15 So one is public interest we didn't talk about, and I
16 consider that something of a wash here between the two parties.
17 If I had to evaluate where the public interest falls, there's
18 really a public interest in keeping this campground open and
19 there's a public interest in the nature of the forest that's
20 being managed here, so I consider that something of a wash.

21 And as I said, I believe the plaintiffs have made
22 their showing of the likelihood of irreparable harm to them.
23 So that is a factor that tips in plaintiff's favor.

24 The balance of harms here, balance of equities and
25 hardships, in my view, favors plaintiff. And so the real

1 question under the *Alliance for Wild Rockies* is does it favor
2 plaintiffs or does it sharply tip in plaintiff's favor. Here,
3 in my view, it sharply tips in plaintiff's favor.

4 So I'll analyze the remaining factor under that
5 rubric. So if it sharply tips in plaintiff's favor, the
6 plaintiffs have to have raised serious questions that go to the
7 merits. And I believe they have done so here on a variety of
8 issues. I'm not real impressed with the strength of the NFMA
9 argument, given the substantial deference in play and my idea
10 that not much has been shown to make this a true flip-flop, but
11 there are other issues on -- particularly on scoping and the
12 categorical exclusion and its application here or not that I
13 think are, at a minimum, serious questions going to the merits.

14 If I backed up from that and said, well, it's simply
15 that the balance of hardships favors plaintiff here, then
16 they'd have to show likelihood of success on the merits. And
17 although I'm a little more concerned about that, since I think
18 it's a very close call, I'd grant the injunction on those
19 grounds also, even if I weren't applying the separate rubric of
20 *Alliance for Wild Rockies*.

21 Therefore, I grant the requested injunction sought by
22 plaintiffs in this case.

23 I would like to move expeditiously towards a complete
24 resolution of this matter. I don't know if that's better done
25 by allowing you some time to meet with each other and propose a

1 case schedule or taking that time right now.

2 Do you have a preference from plaintiff?

3 MR. BUCHELE: Your Honor, I would like to try to work
4 something out with Mr. Tustin, if we can, and do that within a
5 couple of days, I would hope.

6 THE COURT: Within two weeks from today, I want the
7 parties to submit a joint proposed case management schedule.
8 Joint proposed doesn't mean I'm forcing you to submit a joint
9 schedule. On anything as to which you disagree, just let me
10 know. I'll either resolve it or get on the phone with you all
11 and then resolve it, depending on the seriousness of the
12 divergence.

13 Ms. Stephens, that date?

14 THE CLERK: October 20th.

15 THE COURT: Anything further from plaintiff today?

16 MR. BUCHELE: No, thank you, Your Honor.

17 THE COURT: Anything further from the government?

18 MR. TUSTIN: No, thank you, Your Honor.

19 THE COURT: We'll be in recess.

20 THE CLERK: This court is adjourned.

21 (Proceedings concluded.)

22

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

November 9, 2016

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

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40 acres [1] 29/5

411 [1] 2/5

5

503 [1] 2/18

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